



This document is scheduled to be published in the Federal Register on 09/30/2016 and available online at <https://federalregister.gov/d/2016-23196>, and on [FDsys.gov](https://fdsys.gov)

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 22, and 52

**[FAC 2005-91; FAR Case 2016-007; Item III; Docket No. 2016-0007;
Sequence No. 1]**

RIN 9000-AN10

**Federal Acquisition Regulation: Non-Retaliation for Disclosure
of Compensation Information**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.), entitled "Non-Retaliation for Disclosure of Compensation Information," and a final rule issued by the Department of Labor.

DATES: Effective: **[Insert date of publication in the
FEDERAL REGISTER].**

Applicability Date: This rule applies to solicitations and contracts issued on or after the effective date of the FAR rule. Contracting officers are expected to work with their existing contractors and bilaterally modify their contracts, to the extent feasible,

to include the amended clause at FAR 52.222-26, Equal Opportunity. See FAR 1.108(d).

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by FAC 2005-91, FAR Case 2016-007, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "FAR Case 2016-007". Select the link "Comment Now" that corresponds with "FAR Case 2016-007". Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2016-007" on your attached document.

- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405-0001.

Instructions: Please submit comments only and cite "FAR Case 2016-007" in all correspondence related to this case. Comments received generally will be posted without change to <http://regulations.gov>, including any personal and/or business confidential information provided. To confirm

receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202-969-7207 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2005-91, FAR Case 2016-007.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are issuing an interim rule amending the FAR to implement Executive Order (E.O.) 13665, entitled "Non-Retaliation for Disclosure of Compensation Information." The E.O. was signed April 8, 2014, and was published in the Federal Register at 79 FR 20749, on April 11, 2014. This interim rule is also implementing the final rule issued by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor (DOL) to implement E.O. 13665. The DOL final rule was published in the Federal Register at 80 FR 54934, on September 11, 2015, entitled "Government Contractors, Prohibitions Against Pay

Secrecy Policies and Actions.” The DOL rule revises 41 CFR part 60-1.

E.O. 11246, originally issued September 24, 1965, establishes nondiscrimination and affirmative action obligations in employment for Federal contractors and subcontractors. It prohibits employment discrimination because of race, color, religion, sex, sexual orientation, gender identity, or national origin. E.O. 13665 amends E.O. 11246 to provide for a uniform policy for the Federal Government to prohibit Federal contractors from discriminating against employees and job applicants who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants. Also, the E.O. indicates that it promotes economy and efficiency in Federal Government procurement and supports enforcement of nondiscrimination and equal employment opportunity.

II. Discussion and Analysis

A. The DOL regulation implements E.O. 13665 by revising the equal opportunity clause to prohibit contractors from discharging, or in any manner discriminating against, any employee or applicant for employment because the employee or applicant inquired

about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.

B. The FAR implements E.O. 11246 in FAR subpart 22.8, FAR clause 52.222-26, Equal Opportunity, and related clauses. This interim rule adds the new discrimination prohibition and incorporates the definitions "compensation," "compensation information," and "essential job functions" from the DOL final rule (41 CFR 60-1.3) within FAR subpart 22.8 and the clauses that are prescribed in FAR subpart 22.8 as follows:

1. 22.802, General. Inserts the new discrimination prohibition.

2. 52.222-26, Equal Opportunity. Inserts definitions for the terms "compensation," "compensation information," and "essential job functions," and 52.222-26(c)(5), which prohibits contractors from discharging, or in any manner discriminating against, any employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. FAR 52.222-26(c)(5) also requires the contractor to incorporate the new discrimination prohibition into existing employee manuals or handbooks and to post it.

C. Conforming changes were made in the FAR clauses 52.212-5, 52.213-4, and 52.244-6.

III. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This interim rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an initial regulatory flexibility analysis (IRFA) has been prepared consistent with 5 U.S.C. 603. The analysis is summarized as follows:

This interim rule is necessary to implement E.O. 13665, Non-Retaliation for Disclosure of Compensation Information (amending E.O. 11246, Equal Opportunity in Federal Employment) as implemented by the final rule issued by the DoL at 41 CFR part 60-1, published in the Federal Register at 80 FR 54934, on September 11, 2015.

The objective of this rule is to provide for a uniform policy for the Federal Government to prohibit Federal contractors from discriminating against employees and job applicants who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants.

The rule will apply to all entities, both small and other than small. Based on the most current data available in the System for Award Management (SAM), there are 328,552 small contractor firms with fewer than 500 employees and 315,902 small contractor firms with less than \$35.5 million in revenue. Thus, the total number of small contractor firms that may be impacted by the rule range from 315,902 to 328,552.

Recordkeeping and reporting requirements of the rule involve regulatory familiarization and administrative costs associated with incorporating revised language into policies, instructions, notices to employees, and subcontracts. In implementing the additional prohibition, the rule requires that contractors and subcontractors disseminate the nondiscrimination provision, using language prescribed by the Director of the Office of Federal Contract Compliance Programs (OFCCP), including incorporating the nondiscrimination provision into existing employee manuals and handbooks and posting it electronically or in conspicuous places available to employees and applicants. An analysis of estimated costs of the regulatory changes was performed in the DOL final rule published in the Federal Register at 80 FR 54934, on September 11, 2015. DoL estimated the total cost of their final rule at \$85.00 per company.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD, GSA, and NASA are not aware of any significant alternatives to the rule that would accomplish the stated objectives of the E.O. and the DOL implementing regulations.

It is necessary for the rule to apply to small entities, because E.O. 11246, as amended, applies when a contractor has contracts or subcontracts with the Government in any 12-month period which have an aggregate total value (or can reasonably be expected to have an aggregate total value) exceeding \$10,000 that are not completely exempted. Every effort has been made to minimize the burdens imposed on small entities.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (FAR Case 2016-007), in correspondence.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C chapter 35) does apply; however, the information collection authorization is under the DOL final rule issued by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor (DOL), which was published in the Federal Register at 80 FR 54934, on September 11, 2015, entitled "Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions," and is assigned OMB Control Number 1250-0008, Prohibitions Against Pay Secrecy Policies and Actions.

This information collection expires December 31, 2018. The other information collection requirements cited at 1.106 that apply to FAR clause 52.225-26, assigned OMB control numbers 1250-0001 and 1250-0003, cover the general recordkeeping provisions of the laws administered by OFCCP.

VI. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. It is important that the FAR is immediately revised to include the requirements of E.O. 13665, entitled "Non-Retaliation for Disclosure of Compensation Information" and the Department of Labor implementing regulation published in the Federal Register at 80 FR 54934, on September 11, 2015 that requires the Federal Government to establish a uniform policy that prohibits Federal contractors from discriminating against employees and job applicants who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants. This action is necessary because DOL's final rule became effective on January 11, 2016, and section 6 of the E.O.

expressly states that the order "shall apply to contracts entered into on or after the effective date of rules promulgated by the Department of Labor." Issuance of an interim rule allows for the requirements to be included in solicitations and contracts immediately and puts contractors on clear notice of legal responsibilities that are already in effect. If the FAR rule is not issued as an interim rule, this new requirement will not be incorporated into contracts, and contractors will be put at unnecessary risk of non-compliance with the E.O. and labor rule. More importantly, this may unnecessarily delay action by contractors in providing the important protections for contractor employees that the E.O. and labor rule are designed to provide. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 22, and 52

Government procurement.

Dated: September 19, 2016.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 22, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 22, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Amend section 1.106 in the table by removing from FAR segment "52.222-26" the OMB control number "1250-0003" and adding "1250-0001, 1250-0003, and 1250-0008" in its place.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

3. Amend section 22.802 by revising paragraph (a) to read as follows:

22.802 General.

(a) Executive Order 11246, as amended, sets forth the Equal Opportunity clause and requires that all agencies—

(1) Include this clause in all nonexempt contracts and subcontracts (see 22.807); and

(2) Act to ensure compliance with the clause and the regulations of the Secretary of Labor—

(i) To promote the full realization of equal employment opportunity for all persons, regardless of race, color, religion, sex, sexual orientation, gender identity, or national origin; and

(ii) To prohibit contractors from discharging, or in any other manner discriminating against, any employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This prohibition against discrimination does not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

* * * * *

4. Amend section 22.809 by revising the introductory text to read as follows:

22.809 Enforcement.

Upon written notification to the contracting officer, the Deputy Assistant Secretary may direct one or more of the following actions, as well as administrative sanctions and penalties, be taken against contractors found to be in violation of E.O. 11246, the regulations of the Secretary of Labor, or the applicable contract clauses:

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Amend section 52.212-5 by—

a. Revising the date of the clause and paragraphs (b) (28) and (e) (1) (v); and

b. In Alternate II, revising the date of the alternate and paragraph (e) (1) (ii) (E).

The revisions read as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS ([**INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER**])

* * * * *

(b) * * *

____(28) 52.222-26, Equal Opportunity ([**Insert Abbreviated Month and Year of Date of Publication in the FEDERAL REGISTER**]) (E.O. 11246).

* * * * *

(e) (1) * * *

(v) 52.222-26, Equal Opportunity ([Insert
**Abbreviated Month and Year of Date of Publication in the
FEDERAL REGISTER**]) (E.O. 11246).

* * * * *

Alternate II ([Insert **Abbreviated Month and Year of Date of
Publication in the FEDERAL REGISTER**]). * * *

* * * * *

(e) (1) * * *

(ii) * * *

(E) 52.222-26, Equal Opportunity ([Insert
**Abbreviated Month and Year of Date of Publication in the
FEDERAL REGISTER**]) (E.O. 11246).

* * * * *

6. Amend section 52.213-4 by revising the date of the
clause and paragraphs (a) (1) (iii) and (a) (2) (viii) to read
as follows:

**52.213-4 Terms and Conditions—Simplified Acquisitions (Other
Than Commercial Items).**

* * * * *

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL
ITEMS) ([INSERT **ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE
FEDERAL REGISTER**])

(a) * * *

(1) * * *

(iii) 52.222-26, Equal Opportunity ([Insert Abbreviated Month and Year of Date of Publication in the FEDERAL REGISTER]) (E.O. 11246).

* * * * *

(2) * * *

(viii) 52.244-6, Subcontracts for Commercial Items ([Insert Abbreviated Month and Year of Date of Publication in the FEDERAL REGISTER]).

* * * * *

7. Amend section 52.222-26 by—

- a. Revising the date of the clause;
- b. Adding to paragraph (a), in alphabetical order, the definitions "Compensation", "Compensation information", and "Essential job functions";
- c. Redesignating paragraphs (c)(5) through (11) as paragraphs (c)(6) through (12), respectively;
- d. Adding new paragraph (c)(5);
- e. Removing from newly designated paragraph (c)(12) "contracting officer" and adding "Director of OFCCP" in its place; and
- f. Removing from paragraph (d) "41 CFR 60-1.1." and adding "41 CFR part 60-1." in its place.

The revision and additions read as follows:

52.222-26 Equal Opportunity.

* * * * *

EQUAL OPPORTUNITY ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

(a) * * *

Compensation means any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement.

Compensation information means the amount and type of compensation provided to employees or offered to applicants, including, but not limited to, the desire of the Contractor to attract and retain a particular employee for the value the employee is perceived to add to the Contractor's profit or productivity; the availability of employees with like skills in the marketplace; market research about the worth of similar jobs in the relevant marketplace; job analysis, descriptions, and evaluations; salary and pay structures; salary surveys; labor union agreements; and Contractor decisions, statements and policies related to setting or altering employee compensation.

Essential job functions means the fundamental job duties of the employment position an individual holds. A job function may be considered essential if—

(1) The access to compensation information is necessary in order to perform that function or another routinely assigned business task; or

(2) The function or duties of the position include protecting and maintaining the privacy of employee personnel records, including compensation information.

* * * * *

(c) * * *

(5)(i) The Contractor shall not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This prohibition against discrimination does not apply to

instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the Contractor's legal duty to furnish information.

(ii) The Contractor shall disseminate the prohibition on discrimination in paragraph (c)(5)(i) of this clause, using language prescribed by the Director of the Office of Federal Contract Compliance Programs (OFCCP), to employees and applicants by-

(A) Incorporation into existing employee manuals or handbooks; and

(B) Electronic posting or by posting a copy of the provision in conspicuous places available to employees and applicants for employment.

* * * * *

8. Amend section 52.244-6 by revising the date of the clause and paragraph (c)(1)(vi) to read as follows:

52.244-6 Subcontracts for Commercial Items.

* * * * *

SUBCONTRACTS FOR COMMERCIAL ITEMS ([**INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER**])

* * * * *

(c)(1) * * *

(vi) 52.222-26, Equal Opportunity ([**Insert Abbreviated Month and Year of Date of Publication in the FEDERAL REGISTER**]) (E.O. 11246).

* * * * *

Billing Code: 6820-EP

[FR Doc. 2016-23196 Filed: 9/29/2016 8:45 am; Publication Date: 9/30/2016]